Filed 11/16/09 P. v. Naya CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>HORACIO NAYA ,<br><br>Defendant and Appellant. | B209227<br><br>(Los Angeles County<br>Super. Ct. No. BA275052) |

APPEAL from an order of the Superior Court of Los Angeles County. Carol Rehm, Judge. Affirmed.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

---

Horacio Naya was convicted by jury of one count of selling, transporting or offering cocaine base for sale (Health & Saf. Code, § 11352, subd. (a)). The trial court found to be true the allegations that he had suffered a prior conviction of a narcotics-related offense within the meaning of Health and Safety Code section 11370.2, subdivision (a) and three prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).[1] It sentenced appellant to a state prison term of 11 years.

In a previous appeal from that judgment, we concluded that the trial court erred in failing to conduct an in camera *Pitchess*[2] hearing to determine whether there were any relevant, discoverable personnel records of the two police officers involved in appellant's drug arrest. On remand, the trial court conducted the in camera hearing and found relevant records, which it ordered produced to the defense. Appellant thereafter filed a motion for new trial, arguing that the failure to have received the newly produced *Pitchess* discovery for use at trial prejudiced him and entitled him to a new trial. The trial court denied the motion. Appellant now appeals from the denial of this motion, contending that the trial court abused its discretion.

We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND[3]

On July 29, 2004, at approximately 9:00 p.m., Los Angeles Police Officer Damien Levesque and his partner, Officer Matthew Ziegler, went to the area of Seventh and South Carondelet Streets, in the City of Los Angeles, to set up a surveillance. The area is primarily residential, but 707 South Carondelet Street is a small liquor store. Numerous citizen complaints had been received of drug sales in that area, a known drug area, by members of the Marasalvatrucca criminal street gang, also known as the M.S. gang. Officer Levesque had had three prior contacts with

---

1 All further statutory references are to the Penal Code unless otherwise indicated.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

3 We restate the facts as set forth in our initial opinion in this matter, filed on July 24, 2006.

appellant in the preceding weeks, the most recent just 15 minutes before setting up the surveillance. During the contacts appellant admitted being a longstanding member of the M.S. gang.

After setting up the surveillance, Officer Levesque observed appellant standing on the sidewalk, between 707 and 717 South Carondelet waving his hands at passing vehicles. Officer Levesque was positioned 150 to 175 feet from appellant and was using very strong binoculars.[4] His position was elevated and the focus of his observations was directly in front of him, not at an angle. He had "a clear and unobstructed view of [appellant] and his entire transaction with each of the different males that approached him." There were streetlights and light coming from the liquor store.

Officer Levesque observed an African-American man approach appellant and extend his right hand, which was holding an unknown amount of United States currency. Appellant accepted the money with his left hand and simultaneously placed his right hand in a cupped position over his mouth from which he retrieved an unknown object. He then extended his cupped hand to the other man, who accepted the contents in his palm. That person then placed his palm to his mouth, as if putting something inside it, and walked away. The officers took no action because drug buyers and sellers often place narcotics in their mouths so they can be easily swallowed if they are detained by police. Cocaine base does not dissolve in the mouth.

Approximately five minutes later, another African-American man approached appellant. He handed appellant an unknown amount of money with his right hand. Appellant accepted the money with his right hand and cupped his left hand, placed it over his mouth from which he retrieved an unknown object that he placed in the other man's palm. The man closed his fist and walked away. Officer Ziegler contacted the chase team of Edgar and Steve Hernandez, and instructed Officer Edgar Hernandez to

---

4 Officer Ziegler estimated that he was 140 to 150 feet from appellant.

detain the individual. When the officer first saw the man, the man's hands were open at his side. Nothing was recovered from this individual.

Five minutes later, a third African-American man approached appellant and engaged in a brief conversation. This person extended his right hand, which contained currency. Appellant took the money and placed it into his right front pocket, retrieved unknown objects from his mouth and placed them with his thumb and index fingers into the third man's palm. The man accepted the objects, placed them into his right front shorts pocket and walked away. Officer Ziegler alerted the chase team of Officer Andrade and Officer Cota. When Officer Cota first saw the individual, the person had his right hand in his shorts pocket. He was arrested. The officers recovered off-white wafers, later determined to contain cocaine, from his right front shorts pocket.

All three contacts by appellant occurred within a 15- to 20-foot span, in front of 707 South Carondelet. All three of the men were M.S. gang members. None entered the liquor store. During the transactions, Officer Ziegler saw appellant bend down at least twice near a bushy area. He checked that area after appellant was detained but recovered nothing.

Officer Levesque saw the Hernandez chase team approach and detain appellant. He did not try to flee or discard any weapons or objects. He simply turned quickly from the officers and tried to walk away. Officer Edgar Hernandez searched around the area where appellant was detained and searched appellant. He used his flashlight to see the ground because, although lit sufficiently to clearly see a person handing currency to another person, it was not well lit. No weapon or cell phone was recovered from appellant.

At the station, Officer Levesque saw Officer Andrade and Officer Cota with Wilson, the third man who made contact with appellant. As Officer Levesque booked appellant, appellant told him that his name was Samuel Chegue, gave a home address that was not near the arrest location and said he was unemployed. Officer Andrade searched appellant and recovered $78 in various small denominations.

Officer Hernandez testified that sellers generally have a stash or hiding spot for their drugs next to them when they are selling. They put some of the drugs in their mouth so they can be swallowed if police detain them.

Garrett Fitzgerald, a narcotics buy expert, opined that the scenario on the evening of the surveillance indicated that appellant was selling narcotics to each of the three individuals who approached.

As a result of the foregoing, the district attorney filed an information charging appellant with a single count of selling cocaine base in violation of Health and Safety Code section 11352, subdivision (a) and alleging that appellant had previously been convicted of a narcotics-related offense within the meaning of Health and Safety Code section 11370.2, subdivision (a). It also alleged that appellant had served six prior prison terms within the meaning of section 667.5, subdivision (b).

During pretrial proceedings, appellant filed an amended *Pitchess* motion, supported by the declaration of his counsel, asserting that he believed that Officers Levesque and Ziegler fabricated that they saw appellant selling drugs. Appellant sought personnel records from the officers' employment files related to complaints against them for false arrests, illegal search and seizure, fabrication of charges, and evidence of dishonesty and improper tactics. The trial court denied the motion, finding that there was an insufficient factual scenario to grant it.

In a jury trial, appellant was found guilty as charged. The trial court found the prior drug conviction and prior prison term allegations to be true.

Appellant appealed from the judgment, claiming, among other issues not germane to this appeal, that the trial court abused its discretion in denying his request for an in camera hearing to determine whether he was entitled to discover the records of Officers Levesque and Ziegler. We agreed and conditionally reversed the judgment and remanded the matter to the trial court with directions that it conduct an in camera

hearing on appellant's discovery motion as limited by our decision.[5] We instructed that if no discoverable information regarding the officers was revealed at the hearing, the trial court was to reinstate the original judgment and sentence, which was to stand affirmed. If the in camera hearing yielded discoverable information that would lead to admissible evidence helpful to appellant's defense, the trial court was to grant the discovery request, allow appellant an opportunity to demonstrate prejudice and order a new trial if appellant was successful in making that showing. If prejudice was not demonstrated, we directed that the original judgment be reinstated and that it would stand affirmed.

On remand, the trial court conducted the in camera hearing that we mandated. The custodian of the officers' personnel records produced records pertaining to Officers Levesque and Ziegler that the trial court found relevant to the subjects of fabrication, false statements and dishonesty. The trial court ordered them produced to the defense.

After reviewing the records, appellant filed a motion for new trial, arguing that the newly produced information obtained in the *Pitchess* discovery "would have been very useful in trial to call into question both officers' credibility . . . ." He conclusorily argued that had he had the information for use in trial, the result "would have been substantially different." He now appeals from the denial of that motion.

**DISCUSSION**

Appellant contends that the trial court abused its discretion when it denied his motion for new trial. He argues that the testimonies of Officers Levesque and Ziegler "were the centerpiece of the prosecution's case against appellant . . . . The outcome of appellant's case therefore hinged on Levesque's and Ziegler's credibility." Consequently, evidence undermining their credibility would have altered the result. This contention is without merit.

---

[5] We found that some of the information sought by appellant was not discoverable. We therefore limited the information to that which he was entitled.

We will not reverse the denial of a motion for new trial on appeal unless it is shown that the trial court manifestly and unmistakenly abused its discretion. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) We review to determine whether the trial court abused its discretion in concluding that there was no reasonable probability that there would have been a different result had the *Pitchess* evidence been available to the defendant for trial. (*People v. Gaines* (2009) 46 Cal.4th 172, 181; *People v. Clauson* (1969) 275 Cal.App.2d 699, 706.)

We have carefully reviewed the complaints against Officers Levesque and Ziegler produced as a result of the in camera hearing and conclude that the trial court did not abuse its discretion.

First, appellant's motion for new trial failed to present any declaration or affidavit of persons who purportedly were going to provide the newly discovered evidence. This deficiency alone justified the trial court's denial of the motion. " . . . When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, *the affidavits of the witnesses by whom such evidence is expected to be given*, . . ." (§ 1181, subd. 8; italics added; *People v. Beeler* (1995) 9 Cal.4th 953, 1005 [defense counsel's declaration insufficient].)

Second, the complaints bore minimally, if at all, on fabrication, false statements or the officers' honesty. It is therefore doubtful that they would have been admitted in evidence and, if they were, they would have made little difference in the jury's assessment of the officers' credibility.

Third, appellant failed to establish that these claims would result in admissible evidence. In connection with one complaint, the complainant was deceased, therefore precluding admissible evidence on his claim.

Fourth, even if the evidence obtained from the officers' personnel records was minimally relevant, the trial court still retained its authority to exclude it under

Evidence Code section 352.[6] Evidence of one of the complaints, for example, would potentially involve calling at least six witnesses and might reasonably be excluded by the trial judge because it would consume an undue amount of time.

Finally, on evaluating the credibility of the claims, it would appear that they are substantially unfounded. Appellant argues that "the [trial] court in effect usurped the jury's role as factfinder by affirming appellant's conviction based on its own credibility determinations of the *Pitchess* information." We disagree. The trial court may consider the weight and credibility of the proposed evidence in deciding whether to grant a motion for new trial. (See *People v. Gaines* (1962) 204 Cal.App.2d 624, 628-629; *People v. Bradford* (1927) 84 Cal.App. 707, 713-714 [affidavit of codefendant, who was shown at trial to be untrustworthy, insufficient for new trial].) It is manifest that a trial court cannot assess whether there is a probability of a different result based upon new *Pitchess* evidence unless it considers the credibility of the witness and evidence, which bear heavily on whether a different result was likely. The trial judge who oversaw the trial is in the best position to evaluate the impact of the later discovered complaints against the officers involved.

We therefore conclude that it is not probable that if the *Pitchess* evidence had been available to appellant at trial, the result would have been more favorable to him. Appellant was not therefore prejudiced by failure to obtain *Pitchess* discovery for use at trial.

---

**6** Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

## DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ